IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.BALAKRISHNAN NAIR

FRIDAY, THE 16TH MARCH 2007 / 25TH PHALGUNA 1928

WP(C).No. 4002 of 2007(B)

PETITIONER:

M/S. MANJOO & CO.,
MUNICIPAL BUS STAND BUILDING, KANNUR,
A PARTNERSHIP FIRM REPRESENTED BY ITS
MANAGING PARTNER, P.MURALIDHARAN.

BY ADV. SRI.GEORGE POONTHOTTAM

RESPONDENTS:
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1. **STATE OF KERALA, REPRESENTED BY ITS**
   SECRETARY TO GOVERNMENT, TAXES DEPARTMENT,
   THIRUVANANTHAPURAM.

2. **THE SALES TAX OFFICER,**
   OFFICE OF THE COMMERCIAL TAX OFFICER,
   KUTHUPARAMBA.

3. **THE COMMERCIAL TAX OFFICER,**
   IIIRD CIRCLE, KANNUR.

4. **THE COMMISSIONER FOR COMMERCIAL TAXES,**
   THIRUVANANTHAPURAM.

BY SPL.GOVERNMENT PLEADER (TAXES)SRI.V.V.ASOKAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 12/03/2007 ALONG WITH O.P.NO.20701 OF 2002 AND CONNECTED CASES, THE COURT ON 16/03/2007 DELIVERED THE FOLLOWING:

WPC.NO.4002/2007B

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: **COPY OF THE INSPECTION REPORT DTD. 21/01/2004.**

EXT.P2: **COPY OF THE JUDGMENT IN WP(C) NO.4143/2004 DTD. 6/02/2004.**

EXT.P3: **COPY OF THE ORDER NO.C3-8612/04/CST DTD. 29/03/2004.**

EXT.P4: **COPY OF THE INTERIM ORDER IN WP(C) NO.10347/2004 DTD. 2/04/2004.**

EXT.P5: **COPY OF THE DETAILS AVAILABLE WITH THE PETITIONER REGARDING THE REMITTANCE OF TAX REMITTED BY THE PRINCIPAL DEBTORS M/S. SMARTWIN.**

EXT.P6: **COPY OF THE DETAILS AVAILABLE WITH THE PETITIONER REGARDING THE REMITTANCE OF TAX REMITTED BY THE PRINCIPAL DEBTORS M/S.PLAYWIN.**

EXT.P7: **COPY OF THE DETAILS AVAILABLE WITH THE PETITIONER REGARDING THE REMITTANCE OF TAX REMITTED BY THE PRINCIPAL DEBTORS LOTUS.**

EXT.P8; **COPY OF THE DETAILS AVAILABLE WITH THE PETITIONER REGARDING THE REMITTANCE OF TAX REMITTED BY THE PRINCIPAL DEBTORS FORTUNE.**

EXT.P9: **COPY OF THE JUDGMENT OF THE SUPREME COURT DTD. 28/04/2006.**

EXT.P10: **COPY OF THE ORDER OF THE SUPREME COURT DTD. 27/07/2006.**

EXT.P11: **COPY OF THE REPLY SUBMITTED BY THE PETITIONER.**

EXT.P12 SERIES: **COPIES OF THE NOTICES ISSUED UNDER SECTION 17(3) OF THE KGST ACT TO THE PETITIONER BY RESPONDENTS 3 AND 4.**

/TRUE COPY/

KSS

K.BALAKRISHNAN NAIR, J.

O.P.Nos.20701 & 29544/2002 and
W.P.(C) Nos.13011/2004, 4002, 4898,
4989, 4997, 5000, 5060, 5106, 5200,
5308, 5323, 5546, 5578, 5797, 6061,
6067, 6131, 6574, 6592, 6706, 6946,
6961, 7150, 7858, 7980, 8229, 8346,
8524, 8614 & 8631/2007

JUDGMENT

The point that arises for decision in all these cases is whether the State Government can collect sales tax or licence fee from the dealers engaged in the sale of lottery tickets. So, they are heard together and disposed of by this common judgment. W.P.(C) No.4002/2007 is treated as the main case for the purpose of referring to the exhibits.

W.P.(C) No.4002/2007:

2. The brief facts of the case are the following. The petitioner, which is a partnership firm, was a dealer of on-line lotteries, run by M/s.Playwin, Lotus, Smartwin and Fortune. It has been served with Ext.P12 series notices under Section 17(3) of the Kerala General Sales Tax Act, 1963, proposing to collect licensing fee as contemplated under Section 5BA of the said Act. So, this Writ Petition is filed by it, seeking a

declaration that Section 5BA is unconstitutional and also seeking to quash Ext.P12 series notices. The petitioner submits, in view of the Constitution Bench decision of the Apex Court in **Sunrise Associates v. Government of NCT of Delhi & Ors.** [(2006)5 SCC 603], no tax can be collected in connection with the sale of lottery tickets. The said judgment dated 28.4.2006 is produced as Ext.P9 in this writ petition. Later, the Apex Court by Ext.P10 order dated 27.7.2006 ordered that the State will neither be liable to refund the tax already collected, nor collect any tax for the period prior to the date of Ext.P9 judgment. In view of the said position, the petitioner submits, no further tax can be collected from it. It is also submitted that since the Apex Court in **Sunrise Associates** (supra) has held that lottery ticket is an actionable claim and therefore not "goods" for the purposes of the K.G.S.T.Act, Section 5BA is unconstitutional.

3. A counter affidavit has been filed on behalf of the respondents, supporting the impugned notices. According to them, the decision in **H.Anraj v. Government of Tamil Nadu** [(1986)1 SCC 414], treating lottery tickets as goods for the purpose of sales tax was holding the field up to 28.4.2006. So, the respondents relying on **Somaiya Organics (India) Ltd. v. State of U.P.** [(2001)5 SCC 519], submitted that till the above said

date, the levy of tax was not non est and therefore, the tax due up to the said date can be collected.

4. Heard the learned counsel on both sides. "Goods" is defined in Section 2(xii) of the K.G.S.T. Act, which reads as follows:

> "(xii) 'goods' means all kinds of movable property other than newspapers, **actionable claims**, electricity, stocks and shares and securities and includes live stock, all materials, commodities and articles including those to be used in the construction, fitting out, improvement or repair of immovable property or used in the fitting out, improvement or repair of movable property and every kind of property whether as goods or in some other form involved in the execution of a works contract, and all growing crops, grass or things attached to, or forming part of the land which are agreed to be severed before sale or under the contract of sale."

Actionable claim has been expressly excluded from the above definition of "goods". "Sale" is defined in Section 2(xxi) as follows:

> "(xxi) 'sale' with all its grammatical variations and cognate expressions means every transfer whether in pursuance of a contract or not of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge."

The legislative entry, which enables the State legislature to legislate on sales tax is Entry 54 of List II of the 7th Schedule of the Constitution of India, which reads as follows:

> "Taxes on the sale or purchase of goods other than

newspapers, subject to the provisions of entry 92A of List I."

"Tax on sale or purchase of goods" has been defined in clause (29A) of Article 366 of the Constitution of India. In **Sunrise Associates** (supra), the Apex Court, after noticing the definitions of "goods" and "sale", apart from the relevant constitutional provisions, has held as follows:

> "We have noted earlier that all the statutory definitions of the word 'goods' in the State Sales Tax Laws have uniformly excluded, inter alia, actionable claims from the definition for the purposes of the Act. Were actionable claims etc., not otherwise includible in the definition of 'goods' there was no need for excluding them. In other words, actionable claims are 'goods' but not for the purposes of the Sales Tax Acts and but for this statutory exclusion, an actionable claim would be 'goods' or the subject matter of ownership. Consequently, an actionable claim is movable property and 'goods' in the wider sense of the term but a sale of an actionable claim would not be subject to the sales tax laws.
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> Xxxxx xxxxx xxxxx xxxxx
>
> A lottery ticket has no value in itself. It is a mere piece of paper. Its value lies in the fact that it represents a chance or a right to a conditional benefit of winning a prize of a greater value than the consideration paid for the transfer of that chance. It is nothing more than a token or evidence of this right. The Court in H.Anraj, as we have seen, held that a lottery ticket is a slip of paper or memoranda evidencing the transfer of certain rights. We agree.
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> Xxxxx xxxxx xxxxx xxxxx
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> The question is, what is this right which the ticket represents? There can be no doubt that on purchasing a lottery ticket, the purchaser would have a claim to a conditional

> interest in the prize money which is not in the purchaser's possession. The right would fall squarely within the definition of an actionable claim and would therefore be excluded from the definition of 'goods' under the Sale of Goods Act and the Sales Tax statutes."

In view of the above authoritative pronouncement of the Apex Court, no tax can be levied, collected or demanded in connection with the sale of lottery tickets. The Apex Court overruled the decision in **H.Anraj**'s case [(1986)1 SCC 414) only prospectively. So, a doubt arose whether tax could be collected till the date of the judgment in **Sunrise Associates.** The said doubt is also resolved by Ext.P10 order of the Apex Court dated 27.7.2006, wherein it was held as follows:

> "Neither the State will be liable to refund the tax already collected nor collect any further tax for the period prior to the date of the judgment."

6. In view of the above direction of the Apex Court, the petitioner is entitled to succeed. Accordingly, the Writ Petition is allowed. Section 5BA of the K.G.S.T. Act is declared as ultra vires and unconstitutional. The State and its officers are interdicted from proceeding with Ext.P12 series notices. It cannot collect any sales tax or licence fee under the K.G.S.T. Act from the petitioner.

6131, 6574, 6592, 6706, 6946, 6961, 7150, 7858, 7980, 8229, 8346, 8524, 8614 & 8631/2007:

7. In view of the judgment in W.P.(C) No.4002/2007 and the judgments of the Apex Court, which are produced as Exts.P9 and P10 in the said writ petition, these writ petitions are also allowed. The respondents, the State and its officials, are restrained from collecting any tax or licence fee under the K.G.S.T. Act from the petitioners/dealers of lottery tickets. No costs.

16th March, 2007. K.BALAKRISHNAN NAIR, JUDGE.

Nm/